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Clough, Allen E.

"The true purpose of the loss settlement"

[New York]

[c1914]

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"The True Purpose of the Loss Settlement"

AN ADDRESS

Delivered before the Ninety-seventh Meeting

OF

The Insurance Society of New York

ON

Tuesday, November 10th, 1914

BY

Allen E. Clough,

Secretary, Committee on Losses and Adjustments
New York Board of Fire Underwriters

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"LOSS ADJUSTMENT" LECTURES

"THE TRUE PURPOSE OF THE LOSS SETTLEMENT"—Theory of Insurance. Indemnity. —*Allen E. Clough.*

"WHAT IS A FIRE LOSS?"—Direct and Consequential loss—the distinction between. No Liability for loss by interruption of business, manufacturing processes, or otherwise. First lines of policy and policy condition line 42. —*W. N. Bament.*

"CASH VALUE"—Actual cash value of property at the time any loss or damage occurs. Liability is for the actual cash value of the property at the time any loss or damage occurs, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the assured to repair or replace same with material of like kind or quality. Policy condition lines, 1, 2. —*L. C. Williams.*

"THE APPRAISAL" — Appraisals — Options reserved to the company. Policy condition lines 3-5, 86-93. —*W. O. Robb.*

"THE CLAIM—THE PROOF OF LOSS—WHEN IS LOSS PAYABLE?"—The sum for which the company is liable shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of loss have been received by company in accordance with the terms of the policy. What is a claim and satisfactory proof of loss? Policy condition lines 2, 3, 4, 67-85, 92-95, 106-107. —*Robert J. Fox.*

"ABANDONMENT, PROTECTION AND REMOVAL OF PROPERTY"—There can be no abandonment of the property to the company, and, if the property is so endangered by fire as to require removal to a place of safety the future liability of the company in reference thereto, including its cover during and after the fire, and whether liable for the expense of the removal of the goods in danger; the duty of the assured to protect his property from further damage. Policy condition lines 5, 6, part of 32, 33, 60-66, 67, 68. —*Frederick B. Campbell.*

"CONCEALMENT, MISREPRESENTATION, FRAUD OR FALSE SWEARING"—Before or after a loss. Policy condition lines 7-10. —*Frank Sowers.*

"OWNERSHIP"—Sole and unconditional ownership—Insurable interest—Change in interest, title or possession. Policy condition lines 16, 17, 18, 19, 20, 21, 22. —*Edgar J. Nathan.*

"INCREASE IN HAZARD"—Policy condition lines 11-16, 23-30, 49-50. —*Hartwell Cabell.*

"FORMER AND PRESENT DAY METHODS OF ADJUSTMENT" —*Samuel R. Weed.*

"NON-LIABILITY MATTER"—No liability 1or loss by order of civil authority; for loss by explosion unless fire ensues; if building or any part thereof fall except as a result of fire; for loss occasioned by ordinance or law regulating construction or repair of building. Policy condition lines 31, 32, 34, 36, 37. —*William B. Ellison.*

"UNUSUAL AND INTERESTING FIRE LOSS CLAIMS" —*William R. Pitcher.*

"LIABILITY FOR INTERNAL REVENUE TAX AND CUSTOMS DUTY"

"NON-LIABILITY MATTER, UNLESS SPECIFICALLY ASSUMED"—No liability, unless specifically assumed on drawings, tools, implements, models, patterns, scientific apparatus, store or office furnitures, or fixtures, or property held on storage or for repairs. Policy condition lines 38-41. —*W. J. Nichols.*

"THE MORTGAGEE CLAUSES, THE STANDARD MORTGAGE CLAUSE, THE SIMPLE LOSS PAYABLE CLAUSE"—If with the consent of the company there exists under the policy an interest in the subject of insurance—in favor of others than the assured—How the preceding conditions are to be applied. Policy condition lines 56 to 59, inclusive. —*Leo Levy.*

"SUBROGATION"—And the effect of a waiver of subrogation rights. Policy condition lines 102-105. —*W. H. Van Benschoten.*

"CANCELLATION AND SUBSTITUTION" — Knowledge and authority of agent or broker. Policy condition lines 51-55. —*Martin Comboy.*

"WAIVER AND ESTOPPEL" —*W. J. Nichols.*

"THE AGENT—AUTHORITY OF AGENT AND OFFICERS OF COMPANY"—No person unless duly authorized in writing shall be deemed the agent. Policy condition lines 47, 48. This policy made and accepted subject to the foregoing stipulations, (closing paragraph of Standard Policy). —*Frederick T. Case.*

"ADMINISTRATOR, EXECUTORS, ETC."—Authority of over real property—Authority of receivers, trustees and receivers of rents. —*F. O. Affeld, Jr.*

"THE COMMISSION CLAUSE"—For whom it may concern; as now or may hereafter be constituted. —*W. J. Greer.*

"PSYCHOLOGY OF LOSS ADJUSTMENTS"— —*George R. Branson.*

"ASCERTAINMENT OF VALUE AND PROFITS FROM BOOKS OF ACCOUNT" —*Jas. A. McKenna.*

"SALVAGE HANDLING" — Why and how; should be minimized. —*E. W. Wile.*

"DANGERS AND DISAPPOINTMENTS IN SALVAGE HANDLING" —*Edward L. Lewis.*

"ADJUSTMENT OF STOCK LOSSES" —*D. C. Brown.*

"ADJUSTMENT OF AUTOMOBILE LOSSES" —*E. B. Hopwood.*

"ASCERTAINMENT OF MACHINERY VALUES AND LOSSES" —*John Hankin.*

"ADJUSTMENT OF BUILDING LOSSES" —*W. R. Freeman.*

"ADJUSTMENT OF COTTON LOSSES AND HANDLING OF COTTON SALVAGE" —*William A. Cooke.*

"USE AND OCCUPANCY; PROFITS AND COMMISSIONS; RENTS AND LEASEHOLD INSURANCE" —*W. O. Robb.*

"WHOLE INSURANCE"; NON-CONCURRENT INSURANCE—What is the "Whole Insurance"—apportionment of non-concurrent insurance. Policy Condition lines 96-98. —*Allen E. Clough.*

Sept. 13, 1923. ret

The true purpose of the loss settlement under the obligations assumed in a fire insurance policy by the insurer is, of course, to meet fully the requirements of the contract entered into. The definitions of the terms "insure," "insurer" and "insurance" have changed but little, if any, since the earliest days of the business and no claim to originality of ideas can be made as to the thoughts about to be presented.

As will be noted, large use is made of many of the leading works on insurance, the effort now being to merely condense into this necessarily limited statement, the nature of the contract, the reasons therefor and the support these have had by the courts and long established and recognized practice.

What do we mean when we say we insure? Exactly what property or interest do we intend to cover by the contract, under the policy form attached? And, having agreed to insure, and come to an understanding with our client as to what we insure, what shall our attitude be when the client becomes a claimant?

The Century Dictionary defines *Insurer:* "To guaranty indemnity for future loss or damage on certain stipulated conditions." Webster's International defines *Insurance:* "A contract whereby, for a stipulated consideration, called a premium, one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril ***** *Fire Insurance,* insuring for a given period against loss from injury to specified property by fire ***." *Insurer:* "One who contracts to indemnify another by way of insurance."

Indemnity is defined in the Century Dictionary as, "Security given against or exemption granted from damage or loss. Compensation for loss or damage sustained—reimbursement. More specifically, if an obligation to provide for future reimbursement in case loss should occur. If the object of a contract for indemnity is expressed as being to secure against loss or damage ***** the obligation becomes enforceable only when loss or damage has been incurred."

Webster's International says: "*Indemnity:* compensation for loss, damage or injury sustained; as, insurance is a contract of indemnity."

The Standard Dictionary defines "*Insurance Loss:* injury or diminution of value within the limits provided in a policy, or the sum payable on that account."

That early writer Roccus, says, (De Assecur, not. 1) "Assecuratio est contractus quo quis alienae rei periculum in se suscepit, obligando se, sub certo pretio, ad eam compensandam, si illa perierit." This has been well translated in May on Insurance (1-1) as, "Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss."

Richards on Insurance Law (p. 27) says: "At the very outset it must be noted that insurance is a contract of indemnity."

Mr. Justice Lawrence in Lucena v. Crauford (2 B. & P. N. R. 269 (H. L. 1806) pp. 301-303) in answer to questions proposed by the judges, after citing the definitions of Vallin, Roccus and others, said: "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them."

(Wambaugh, Cases on Insurance, p. 30)

Park on insurance (p. 1) says: "Policy is the name given to the instrument by which the contract of indemnity is effected between the insurer and the insured; and it is not like most contracts signed by both parties, but only by

the insurer, who, on that account, it is supposed, is denominated the Underwriter. Notwithstanding this, there are certain conditions ***** to be performed as well by the person not subscribing as by the underwriter, otherwise the policy will be void."

Adam Smith, in his "Wealth of Nations" (1-10), which has been called "the best foundation for the study of political economy," refers thus to Insurance: "That the chance of loss is frequently undervalued; and scarce ever valued more than it is worth, we may learn from the moderate profit of insurers."

Angell on insurance (p. 1) says: "A contract of indemnity is given to a *person*, against his sustaining loss or damage, and cannot properly be called one that insures the *thing*, it not being possible so to do; and, therefore, as Lord Hardwicke has said in Sadlers Co. v. Badcock, (2 Atk. 554) it must mean insuring the person from damage; this is, damage to the thing or to his property."

"The contract for insurance is not an insurance of the subject matter, but an agreement to indemnify a particular person from any damage he may sustain by the destruction of his interests in the article, by any perils insured against."

May on Insurance says: (I. 1. p. 4) "It had its origin in the necessities of commerce, ***** wherever danger is apprehended or protection required, it holds out its fostering hand, and promises *indemnity*. This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss and damage. 'Though based on self interest,' says De Morgan, 'yet it is the most enlightened and benevolent form which the projects of self interest ever took. It is, in fact, in a limited sense, a practical method, the agreement of a community to consider the goods of its individual members as common. It is an agreement that those whose fortune it shall be to have more than average success shall resign the overplus in favor of those who have less."

I do not hesitate to quote at considerable length from a recent English work, "Welford & Otter-Barry's Fire Insurance," as the theory of the fire insurance contract is so clearly expressed therein. (p. 1)) "A contract of fire insurance is a contract one person undertakes in return for the agreed consideration to indemnify another person against loss or damage occasioned by fire up to the agreed amount." (p. 5) "The contract of fire insurance, like all other contracts of insurance, differs from an ordinary contract in that it requires, throughout its existence, the utmost good faith, or *uberrima fides*, as it is called, to be observed, on the part of both the assured and the insurers." (p. 6-7) "The contract of fire insurance resembles the contract of marine insurance and differs from that of life assurance in that it is purely a contract of indemnity against losses actually sustained. Even where by the terms of the contract, as is usually the case, the insurers expressly undertake in the event of loss or damage by fire to the property insured, to pay or make good the loss or damage up to a specified sum, the contract is nevertheless one of indemnity, and of indemnity only."

"It is the fundamental principle of fire insurance that the assured, in case of a loss covered by his contract, shall, so far as the sum specified in the contract permits, be fully indemnified, but shall never be more than fully indemnified. This principle is applied in accordance with the following rules, namely:—

"(1) To establish a right to indemnity it is necessary for the assured to show that he has in fact sustained a loss by reason of his interest in the subject-matter of insurance."

"(2) The extent of the assured's indemnity must, subject to the terms of the contract be measured by the loss which he has actually sustained."

"(3) The assured is, therefore, not entitled to receive anything by way of indemnity, even though the property insured be destroyed by fire, if he has in fact sustained no loss. Thus, if he has parted with the whole of his interest in the subject-matter of insurance before the happening of the fire which destroys it, he retains nothing to which the right of indemnity can attach."

"Even where his interest remains at the time of the fire, he may in reality lose nothing, since his loss may have been made good to him by some third person who was under a legal obligation to do so. In neither case, therefore, is the assured entitled to recover anything from the insurers."

"It further follows that if his loss has been in any way diminished, his right to indemnity must be proportionately abated."

"(4) If the assured has once received from the insurers the full value of the subject-matter of insurance, he cannot retain for himself any benefit whatever arising out of his interest in such subject-matter, by reason of which he would be more than fully indemnified. He is bound, therefore, upon payment of his indemnity to account to the insurers for any compensation which he may receive from any third person legally responsible to him for the loss, and to hand over to them, if it is in his power to do so, whatever remains of the subject-matter of insurance, together with all his rights, if any, against third persons arising out of the loss."

"In working out the principle of indemnity, it frequently happens that the assured, either with the assistance of the insurers, or on their behalf, sues a person alleged to be responsible for the loss."

"The contract is, in theory, a contract of perfect indemnity, subject to the difficulty in practice of ascertaining what is a perfect indemnity and subject also to a possible qualification in the case of valued policies."

(p. 314) "(4) The insurers may, however, by the terms upon which they settle the assured's claim, or by their conduct towards the assured, debar themselves from afterwards asserting their rights."

The contract of fire insurance is simple indemnity; it is a contract of personal indemnity; it insures *persons* against such loss as may happen to the *things* described as being the property of the insured or in which they have an insurable interest. (Columbia Ins. Co. v. Lawrence, 10 Pet. 507. Carpenter v. Providence Washington Ins. Co. 16 Pet. 495).

As is well known, so-called "valued policies" are sometimes written as a matter of convenience, mainly on property whose value would be difficult of ascertainment or only at unusual expense after a fire, such as pictures and other works of art, rare books and manuscripts, or collections of stamps, coins and other similar property of no intrinsic value except that the expense of obtaining and assembling them has been large. An agreement is reached in advance on the value of the subject of the insurance which in event of a total loss, in absence of fraud, is accepted as the basis of adjustment. Such policies are not provided for under the Standard Policy law of this State, but are perhaps properly written in the absence of any statutory prohibition. As to this class of policies it may be said that, what shall be considered as indemnity under the contracts is agreed upon in advance of the occurrence of a loss which may or may not happen. "The purpose in all cases is alike,—indemnity for the loss of a valuable interest."

(May on Insurance, I-1—p. 11) (Harris v. Eagle Fire S. C. N. Y. 1810).

Compulsory valued policies, provided for by the statutes of a few States, are contracts of an entirely different character, and cannot be defended successfully—they have no connection with the theory on which insurance is based,

i. e., indemnity, and are practically wager contracts which are frowned on by the law.

(Moving Picture Co. Amer. v. Scottish Union & National Ins. Co., S. C. Penn. 1914) (90 Atl. 642). (Draper v. Delaware State Grange Mutual Fire Ins. Co., 91 Atl. 206). They are believed to foster carelessness on the part of the insured, if not to actually tempt to arson, by all authorities on insurance, including many of the best informed Insurance Commissioners, and those charged with the administration of the laws of the various states having valued policy laws on their statute books.

Marshall, in his Treatise on Insurance (p. 682) says in reference to the early days of fire insurance: "It cannot be denied that this species of insurance affords great comfort to individuals and often preserves whole families from poverty and ruin, and yet it has been much doubted by wise and intelligent persons whether in a general and national point of view the benefits resulting from it are not more than counterbalanced by the mischiefs it occasions. Not to mention the carelessness and inattention which security naturally creates, every person who has any concern in any of the fire offices, or who has attended the Courts of Westminister for any length of time, must own that insurance has been the original cause of many fires in London, with all their train of mischievous consequences."

That this fear was well grounded must be admitted, for notwithstanding the fact that the Courts and the insurance companies have held steadfastly to the theory of indemnity, fire insurance has doubtless been the cause of less care being taken of their property, as to the fire hazard, by many property owners, and, not a few have through all the years since its inception looked upon it as a ready market for their belongings, when otherwise not salable, and have been led to the crime of arson, to which they would not have been tempted except for the possible profit through the fire insurance policy in their hands. The existence of fire insurance has also often prompted persons who have suffered from fires through natural causes, to make fraudulent claims on their insurers and commit perjury, seeing in the destruction of their property opportunities to make illegitimate profits through misrepresentations as to the values of the property insured.

Mr. George Richards has pertinently remarked in commenting on the famous case of Darrell against Tibbetts, decided by the English Courts in favor of the landlord's underwriters and against the landlord who sought to keep his double indemnity, he being insured against loss by explosion on premises occupied by a tenant who had covenanted in the lease to repair any such loss, the underwriters having paid the loss on its occurrence and the tenant having subsequently made the needed repairs as he had agreed:

"The pith and point of our inquiry must be this: Shall the law permit the insured public, including bad men and good men alike, to utilize their insurance contracts as a source of profit? Are such calamities as conflagrations and shipwrecks, imperiling the safety of the public at large, to be converted by canons of insurance law into pecuniary blessings to individuals who are insured against their occurrence, events not to be dreaded and guarded against, but to be hoped for and prayed for, and by unscrupulous men planned for and labored for? If the law allows any man to make a huge profit by his insurance contract, then many a man will deliberately take out and hold insurance with that result in view. If so, he will certainly be apt to welcome a fire, and if he does not deliberately drop the spark that occasions destruction, it is not likely that he will use any special precaution to prevent it. And what sort of a situation then shall we have in the community?

A well known and successful Insurance Company has recently said in the leaflet it sends to its agents:

"Adjustments should always be an honest, pains-taking, deliberate and thorough effort to ascertain the actual loss. To give the impression that companies are careless or indifferently liberal in handling losses and more anxious to please claimants than to reach exactness, has an obvious hurtful influence. To permit the securing of a more or less profit from a fire has in more instances than we know of suggested an opportunity to the fraudulent and criminal.

One case we do know of, that of a professional fire bug who 'suffered' more than a score of fires and finally lodged in the penitentiary for a season. He confessed that his incendiary career was instigated by a quick, careless, lump settlement of an honest damage to his small cigar store stock, which gave him some two hundred dollars profit."

No class of business has a greater interest in maintaining the public conscience, business probity, equity and justice, in the highest sense of these terms, than the underwriter. He must mete as he would have measured to him. He cannot promise indemnity and give less. The golden rule is trite, but still above par as a business policy. On the other hand, if he is careless or complaisant in meeting the claims made upon him and grants materially more than indemnity, or does not choose his clients wisely, his business is in danger of being considered as conducted contrary to public policy and to the detriment of the community, not only materially but morally.

The public is much interested in our business, and through Insurance Commissioners, Attorney-Generals and investigation committees is constantly enquiring into it; will probably require more information of us in the future than it has as yet. Therefore, aside from our duty as citizens of the commonwealth, it behooves us from the standpoint of practical common sense to so conduct our business that we shall not be subject to the criticism that we are lax in our methods and are only interested in the making of the largest profit. We shall only protect ourselves by guarding the community as far as we are able against the occurrence of fires for profit. It is essential to this protection that the origin of fires should be carefully investigated and dishonest claims contested. Because these investigations and contests are expensive and often inconclusive is no argument against them. The underwriter's best interests and those of the public are too closely related for the insurer to buy his peace as cheaply as possible and shut his eyes to the fact that thereby he may be approaching dangerously to essentially compounding a felony.

As has been said, the courts have uniformly held to the theory of indemnity in insurance.

The English Court of Appeal has said: by Judge Brett.

"In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance; and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."

By Judge Cotton.

"I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that it is only a contract of indemnity; it is only to pay that loss which the assured may have sustained by reason of the fire which occurred. In order to ascertain what that loss is, everything must

be taken into account which is received by and comes to the hand of the assured, and which diminished that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss."

And Judge Bowen in the same case uses similar language—
Castellain v. Preston, L. R. 11 Q. B. D. 380, (1883).

The United States Supreme Court accepts this principle in—
Chicago. etc. R. Co. v. Pullman Car Co. 139, U. S. 79, 88.

"The general rule of law (and it is obvious justice) is, that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay."

Chief Justice Knowlton of the Massachusetts Supreme Court said in a recent case:

"A contract for insurance against fire in the form prescribed by our statutes is a contract of indemnity, and the assured is only entitled to be put in the same condition pecuniarily that he would have been in if there had been no fire."

The Supreme Court of Louisiana said in Nicolet v. Insurance Co.:

"If the property at risk had been of a value less than this amount, the assured would have been entitled to no more than an indemnity equivalent to their loss and the sum stipulated in the contract reducible to the actual damage. If the property insured exceeded the amount covered by the policy, the indemnity, in the event of a total loss, could not be enlarged so as to afford full protection." (Wambaugh p. 864, S. C. La. 366).

And later in Hoffman v. Western Marine and Fire Insurance Co.

"The insurer's liability is distinctly defined by the policy, and by well ascertained principles of the law of insurance. If goods are wholly destroyed by fire, the insurer is bound to make indemnity, by paying their value at the time of the loss. If the goods be not destroyed but damaged, the insurer is bound, by the like rule of indemnity, to pay the assured the difference of value between the goods in their sound and in their damaged condition. The idea of a right of abandonment of the goods, which seems to have existed in the plaintiff's mind, and in that of his principal witness, who assisted him in making out the appraisement, is entirely unsanctioned by the law of fire insurance."
(Wambaugh p. 869, S. C. La. 1 La. Ann. 216).

The Supreme Court of Illinois, in Illinois Mutual F. Ins. Co. v. Andes Co.:

"It is difficult to see how this can be done consistently with principle, under a contract which, we apprehend, this must be admitted to be, to indemnify the reassured against the loss it might sustain from the risk it had incurred in consequence of its prior insurance.

Here followed quotations from Bainbridge v. Neilson, 10 East, 329, 347 (1808), to the effect that a policy of insurance is a contract of indemnity, per Bayley, J., and from Hamilton v. Mendes, (1761) per Lord Mansfield, C. J.
(Wambaugh p. 909, S. C. Ill. 1873. 67 Ill. 362).

The Delaware Superior Court has recently said in Draper v. Delaware State Grange Mutual Fire Ins. Co.:

"The contract of insurance against loss or damage to property is a contract of indemnity, and it is an undertaking on the part of the insurer, based upon sufficient consideration, to pay the insured a certain sum of money upon the happening of a certain contingency, i. e. loss occasioned the insured by fire on the property described in the contract.

"A contract of insurance is essentially a personal contract, and it is not a contract to insure property against loss by fire, but is one to insure the owner of property against loss by fire; therefore, destruction by fire of the property described in the contract of insurance is not the contingency upon which the insurer promises to indemnify the insured, but it is only when by fire the insured has sustained a loss that the insurer may be called upon to perform its contract of indemnity.

"A contract of insurance is a contract of indemnity, and its object is to avert a loss rather than to allow a gain, and a policy of insurance against loss to the insured on property in which the insured has no interest amounts to

a wager, and wager policies are void upon the ground that they are contrary to public policy."
(91 Atlantic, 206).

Our own New York Supreme Court said many years ago in Kernochan v. New York Bowery Fire Ins. Co., a case affirmed by the Court of Appeals:

"It is indeed true, as was insisted by the counsel for the defendants, that in this State, since wager policies have been abolished, the assured, whether in a marine or fire policy, can never be permitted to recover more than a full indemnity for the loss which it is proved that he sustained."
(Wambaugh p. 915, 12 N. Y., S. C. 1)

And the Appellate Division of the same Court in 1912, in the case of Heilbrunn v. German Alliance Ins. Co. said:

"The contract of insurance with the mortgagee was nothing more than a contract of indemnity, and the liability of the insurer was measured, not by the amount of the policy, but by the amount of loss incurred by the insured.***** If the defendant is, as in the present case, merely an indemnitor, and the plaintiff has, before suit brought, been paid from other sources all or a part of the amount for which the indemnitor had undertaken to be liable, it is perfectly competent to show that fact by way of defense, and thus reduce the amount recoverable."

(S. C. N. Y., App. Div. 1912) 135 N. Y. Supp. 769.

Many other references could be quoted, but these appear sufficient for our present purpose to establish the fact that, from the early days of insurance to the present, there has been no serious divergence—that the fire insurance contract is one of indemnity only.

We have perhaps been prone to regard the well-known and often referred to decisions in the cases of Foley v. Manufacturers Fire Ins. Co. (152 N. Y. 131) and Michael v. Prussian National Ins. Co. (171 N. Y. 25), both decisions of the N. Y. Court of Appeals, as departing from the indemnity theory, but may not the real facts be, as Mr. Richards has pointed out, that in the first the payment was due to the insured, since up to the time of the trial the contractors had not reinstated or rebuilt, in whole or in part, notwithstanding their agreement so to do, and that therefore the present liability at issue in the case was clear. No question of subrogation was presented to the Court, and it is possible that had the loss been paid and the attempt had then been to enforce the right of subrogation the decision might have been more in line with that in the case of Darrell v. Tibbitts, already referred to. And, as to the case of Michael v. Prussian National Ins. Co., Justice Gray's opinion was evidently based on "1st, that the underwriters had not yet made payment," and were therefore not entitled to claim subrogation, and, "2nd, that the subject matter of the insurance is not the same as the subject matter of the pooling agreement"—or, in other words, that the insurance payment enforced was considered only as the indemnity contracted for. In neither case was the question of double payment considered as actually presented. Chief Justice Andrews said "This flows from the nature of the contract of insurance, which is a contract of indemnity, and when there is no interest there is no room for indemnity; and, doubtless, Justice Gray would unhesitatingly endorse the theory of indemnity, when presented concretely.

It has been argued that the case of Irwin vs. Westchester Fire (58 Misc. 441) affirmed by the Court of Appeals, without opinion (199 N. Y. 550) is a qualification of the doctrine of indemnity applied by the English and United States Supreme Courts. The assured had erected a frame addition to her building in violation of a city ordinance. The Supreme Court at a Special Term, in a proceeding to which the owner was not a party, had adjudged the "addition" to be in violation of the said ordinance and a nuisance and directed the removal by the Common Council. The authorities neglected to obey and later the owner brought an action to restrain the removal of the "addition." Six months

later the Court found as a matter of fact and law that the addition was a violation of the ordinance and nuisance and fourteen months later, following conferences and promises by the owner to remove the addition, at the time of the fire it was essentially still undisturbed on its original foundation. In the meantime, as stated by the Court, with full knowledge of all the circumstances, the agent of the company had insured the property, discussed what was being done with the owner and advised her not to tear it down and not to worry about the matter. The Court said:

"My conclusions are that the judgment and orders of the court, and the plaintiff's promises respecting the character of the 'addition' and its removal, did not change the plaintiff's interest in, title to, or possession of the structure, so long as it remained undisturbed upon her premises, and attached, as it originally was, to the main building, and, moreover, that the defendant is bound by the knowledge of its agents respecting the character and results of the litigation concerning the said 'addition,' and, having issued the policy with such knowledge, cannot now deny its liability on that account."

This decision appears to have been mainly based on the knowledge of and waiver by the company through its agent. Tieman, et al, vs. Citizens Insurance Co. (78 N. Y. Supp. 620) has also been referred to as showing that the New York Courts do not endorse the theory of indemnity as do those of other states, and apparently with some reason, for the Court said (Ingraham, J.):

"The fact that the plaintiffs' property was damaged by a risk within the terms of the policy was at the time of the fire a direct damage to the plaintiffs, which the defendant had insured. The fact that the plaintiffs had offered to sell the property at the price which they subsequently obtained, notwithstanding the impairment of its value by the fire, would not release the defendant from liability; and I cannot see that the execution of this contract would have that effect. I think, therefore, that when these buildings were damaged the express terms of the policy applied, and by it the insurance company became liable to the plaintiffs to the amount that the buildings were damaged, irrespective of the subsequent disposition that they were able to make of the damaged buildings."

Whether, had it been shown that the very contract pending at the time of the fire had been carried out unaltered and unaffected, the Court's views might have been less decided, can only be left to speculation. The Court as constituted in 1902 might have been likely to hold that, 'Money loss is not the true measure of the indemnity under the contract; that the test should be, Did the property the subject matter of the contract suffer diminution in value by the happening of the hazard insured against?' However, it is scarcely to be believed that the New York Court of Appeals will fail to uphold the sound rule of "indemnity only," so sweepingly adopted by other Courts, when cases are presented in which the issue is squarely raised. The signs of the times are that our Courts are giving ear to the criticism of many of our leading jurists and public opinion that mere technicalities should be set aside in favor of substantial justice and public policy.

Clement, Fire Insurance as a Valid Contract—I, 17.
May on Insurance—I, 1, 11.
Cooley, Briefs on the Law of Insurance—I, 85-97.
Richards on Insurance Law—27, 72.
Ostrander—Law of Fire Insurance—356.
Deming vs. Merchants Cotton Press—90 Tenn. 306, 347.
Carpenter vs. Prov. Wash. Insurance Co.—16 Pet. 495.
Eager vs. Atlas Insurance Co.—14 Pick (Mass.) 141, 146.
Cummings vs. Insurance Co.—55 N. H., 458.
Imperial Fire Insurance Co. vs. Coos County—151 U. S., 452.
Illinois Mutual Insurance Co. vs. Hoffman—31 Ill. App. 295, 132 Ill. 522.
Murdock vs. Chenango County Mut.—2 N. Y. 210.

Cross vs. National Fire—132 N. Y. 133.
Borden vs. Hingham Mut.—18 Pick (Mass.) 523.
Castellain vs. Preston—11 Q. B. Div. 380.
Chicago, etc. R. Co. vs. Pullman Car Co.—139 U. S. 79, 88.
Nicolet vs. Insurance Co.—3 La. 366.
Hoffman vs. Western Marine & Fire—1 La. Ann. 216.
Illinois Mutual vs. Andes Insurance Co.—67 Ill. 362.
Draper vs. Delaware State Grange Mutual—91 Atl. 206.

Cooley's Briefs on Insurance (I-78) says: "Whatever analogies may be discovered between the contract of insurance and other kinds of contracts, there are certain fundamental characteristics of the insurance contract that must be taken into consideration in order to understand the distinctions and qualifications observed in the application of the general rules of law to its interpretation."

"The contract of insurance is a voluntary contract, in which the insurers have a right to incorporate conditions, and such conditions will be binding on the insured in the absence of an objection. (Keim v. Home Mutual F. & M. 42 Mo. 38, 97 Am. Dec. 291) (Rann, et al, Exrs. v. Home Ins. Co., C. A., N. Y., I. L. J., V-15). If the insured objects to any condition in the policy, he is under no obligation to make the contract; but if he voluntarily enters into it he will be bound thereby."

"The contract of insurance is a conditional contract in that it indemnifies the insured only in case the loss does not occur from an excepted case, and it insures the property only while located and contained as described in the policy."

Tyler v. Aetna Fire, 2 Wend. (N. Y.) 280; Jones v. Ins. Co. North America, 90 Tenn. 604; 18 S. W. 260; Cooledge v. Continental Insurance Co. 67 Vt. 14, 30 Atl. 798.

Fire insurance being then a promise of indemnity under certain conditions named in the contract written by the insurer and voluntarily accepted by the insured, the insurer and his adjuster must have in mind that the courts have properly held, as a matter not only of law but of equity, that any ambiguities in the contract must be construed in favor of the insured, on the theory that its wording is that of the insurer who is presumed to have accepted any liability the contract can consistently be construed to cover. The claim of contrary intent will not ordinarily be considered or allowed to over-ride the written provisions of a contract.

There should be no argument possible, after a fire has occurred, as to the exact cover of a policy. Its statement that it does insure in accordance with the written policy form, should admit no doubt as to its intent in the minds of the insurer and insured alike. The time for the careful wording of its cover is when the liability is accepted. The needs of the insured should be particularly enquired into and the contract given him should be plainly and explicitly worded, admitting of no ambiguity, and leaving no room for discussion after the fire. Much of the acrimony in adjustments and the charges made against insurance companies of unfairness and alleged desire to cancel their liabilities as cheaply as possible, regardless of justice to their clients, have arisen from carelessly worded policy forms.

It should not be left to the liberality or discretion of the insurance company, or for it to be influenced by the value of the customer's business, whether, after a fire, the policy on "building and permanent fixtures" covers the seating fixtures of a hall or theater, which are merely fastened to the floor by screws and therefore removable without material defacement of the building; whether customs duties are insured in a policy covering on goods in bond; whether

customers' property in the hands of a tailor or furrier and the value of the labor he has expended on them are covered; whether tenant's improvements are to be covered under a building policy in whole or in part. The proper wording of policies in such cases as the last mentioned can only be determined after a careful reading of the existing leases as to their provisions in reference to cancellation on the occurrence of a fire, for removal of the improvements, and as to reversion to the building owner. A permit in a policy for a chattel mortgage does not contemplate the existence of more than one mortgage. Many other illustrations of the point I wish to emphasize might easily be given.

Both insured and insurer are often at fault. The blame will, however, be usually placed on the insurer, and properly, because he is presumed to be familiar with the requirements of his business, the necessity for exact information, and to be expert in the proper wording of his contracts.

Insurance has been called "the handmaid of commerce"—How important it is, has just now been so thoroughly demonstrated that our National Government has been obliged to undertake one branch of it, at least temporarily. It can only be faintly imagined what would be the result if fire insurance should become no longer obtainable, but how many men daily file away insurance policies, which in case of fire should be worth thousands of dollars to them, without taking the trouble to look at more than their filing backs, certainly without reading carefully the policy forms.

It should be the aim of the insurer to impress upon his clients that fire insurance is neither a mystery nor something which cannot be understood by the "plain people;" not a scheme for the fattening of the stockholders nor a "get rich quick" scheme for the initiated few; and that it can as readily be understood by the average business man as his own business, if he will only give it the attention its importance to him warrants if he has a fire.

Losses should be adjusted from the same standpoint as that of any good citizen and honest man endeavoring to carry out his business engagements, bearing in mind his rights and also his responsibilities, remembering that his intent will be judged more by his actions than by his words.

(Clement, Fire Insurance as a Valid Contract, P. 454, 456).

Honest claimants are entitled to prompt attention and the most courteous treatment even if their claims are exaggerated. They should be argued with and shown their errors and mistaken judgment as to their loss.

If the adjuster can impress a claimant with the belief that the adjuster is well informed, fairminded and sincerely desirous of arriving at a settlement which will fully discharge the whole obligation of the company to the insured, he can insist upon the company's rights, limit the settlement to the liability contracted for under the policy, retain the respect and confidence of the claimant and make a good friend for his company. He cannot expect to convince the claimant of the justness of his view unless he has first honestly convinced himself.

Fire insurance is a plain, straight forward business in which the margins of profits are small considering the risk involved. The private and business morals of the men engaged in it as insurers and adjusters will compare favorably with those of men in any profession or line of trade.

I believe that our business with our clients and claimants is so conducted as to give daily evidence of this fact.

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